

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, <i>et al.</i>  and  NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), <i>et al.</i>	08-CA-167313, <i>et al.</i>
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**CHSPSC, LLC AND COMMUNITY HEALTH SYSTEMS, INC.’S RENEWED AND  
MODIFIED MOTION FOR CONSENT ORDER AND FOR PARTIAL DISMISSAL**

**I. INTRODUCTION**

Respondents CHSPSC, LLC (“CHSPSC”) and Community Health Systems, Inc. (“CHSI”) (collectively, the “Corporate Respondents”) hereby submit their Renewed and Modified Motion for Consent Order and for Partial Dismissal (“Renewed Motion”). The Corporate Respondents incorporate the applicable information, arguments and affidavit presented in their initial July 31, 2017 Motion for Consent Order and Dismissal to support the modified consent order presented below.

The Corporate Respondents base their Renewed Motion, in part, on *UPMC*, 365 NLRB No. 153 (2017), in which the Board restored *Independent Stave*, 287 NLRB 740 (1987). In *UPMC*, the Board adopted Judge Carissimi’s recommended acceptance of a consent order identical to the order presented by the Corporate Respondents below. The *UPMC* analysis, including its application of *Independent Stave*, applies to the instant case. The joint and single employer allegations against the Corporate Respondents should be dismissed and the proffered consent order should be entered.

## **II. ARGUMENT**

### **A. The *UPMC* Decision Provides a Clear Path to Resolution.**

Like the instant case, *UPMC* involved multiple hospitals which faced a several allegations, together with single employer allegations against their corporate affiliate/parent. In *UPMC*, General Counsel consolidated twenty-two cases, which together included allegations of: multiple instances of surveillance; multiple threats; multiple interrogations; photographing union activity; disparate enforcement of solicitation policies on several occasions; supporting a company-sponsored labor organization; four separate employee discharges for union activity; and nine separate instances of adverse disciplinary actions for union activity. *UPMC*, 2014 LRRM (BNA) 171779 (NLRB Div. of Judges).

Like the instant case, Judge Carissimi segmented the proceedings, with single employer allegations to be heard in the final hearing phase of the case. Prior to the commencement of the single employer hearing phase, *UPMC* moved to dismiss the single employer allegations against it based on a simple offer to guarantee remedies for substantiated unfair labor practices. That offer became the following Order which the Board entered.

#### **ORDER**

The Respondent, *UPMC*, shall be the guarantor of any remedies that the Board may order in the original decision in this case (JD-62-14). As the guarantor, Respondent *UPMC* must ensure that Respondent *UPMC* Presbyterian Shadyside takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if *UPMC* Presbyterian Shadyside fails to do so.

IT IS FURTHER ORDERED that the allegation in the complaint that Respondent *UPMC* and Respondent *UPMC* Presbyterian Shadyside constitute a single employer is dismissed as, under the circumstances, it would not effectuate the policies of the Act to continue to litigate and reach a decision regarding that allegation.

**B. The Corporate Respondents Newly Proffered Consent Order is Consistent with the Order Entered in *UPMC*.**

The Corporate Respondents proffer the order below, marked up to identify necessary, though primarily form-oriented, variations from the *UPMC* order.

**ORDER**

The Respondent, CHSPSC, LLC ~~UPMC~~ shall be the guarantor of any remedies that the Board may order with respect to the underlying unfair labor practice allegations in this case in the original decision in this case (JD-62-14). As the guarantor, Respondent CHSPSC, LLC ~~UPMC~~ must ensure that the Hospital Respondents ~~UPMC Presbyterian Shadyside~~ takes all steps necessary to comply with any remedies that may be contained in the Board's Order, including providing for any such remedies itself, if the Hospital Respondents ~~UPMC Presbyterian Shadyside~~ fails to do so, subject to CHSPSC, LLC's compliance rights to contest its ability to effectuate non-monetary remedies for divested Hospital Respondents.<sup>1</sup> Community Health Systems, Inc. accepts these terms and has appointed CHSPSC, LLC to be its agent with respect to effectuating compliance.<sup>2</sup>

IT IS FURTHER ORDERED that the allegations in the complaint that Respondent CHSPSC, LLC and Respondent Community Health Systems, Inc. ~~Respondent UPMC and Respondent UPMC Presbyterian Shadyside~~ constitute a single/joint employer with the Hospital Respondents or with one another ~~are~~ is dismissed as, under the circumstances, it would not effectuate the policies of the Act to continue to litigate and reach a decision regarding these allegations.

**C. The Proffered Modified Consent Order Satisfies *Independent Stave* and *UPMC*.**

In *UPMC*, the Board applied *Independent Stave* in a straightforward fashion. The Board analysis from *UPMC*, set forth below, applies on all fours to the instant case.

1. *General* - Single-employer status does not constitute an unfair labor practice.<sup>3</sup> It “provides a backup party—or a potential alternate party—that is responsible for providing whatever

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<sup>1</sup> With all but two of the operating Hospital Respondents having been divested and having lost their management services connection with CHSPSC, CHSPSC must reserve the right to maintain its inability to guarantee certain non-monetary remedies (e.g. bargaining obligations). Affidavit of Ben Fordham, previously filed herein.

<sup>2</sup> CHSI is a holding company. It has no employees and can do no more than appoint an agent to effectuate compliance. Affidavit of Ben Fordham, previously filed herein.

<sup>3</sup> Similarly, General Counsel has not alleged the Corporate Respondents engaged in any unfair labor practices, nor have the Corporate Respondents been defending against any. The *UPMC* analysis directly applies to the instant Motion because it only addresses single/joint status.

relief is ultimately ordered.” *UPMC* at p. 7. UPMC offered a guarantee which was “effectively” this “outcome.” *Id.* The analysis is identical herein.

2. *Independent Stave Factor 1* - The General Counsel’s opposition is “an important consideration weighing against approval, but it is not determinative....” *UPMC* at p. 7. Union and General Counsel consent “is not the decisive factor to be weighed.” *Id.*, quoting *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB at 217. The analysis is identical herein.
3. *Independent Stave Factor 2* - The “reasonableness” factor is “the most important consideration when evaluating a consent settlement agreement.” *UPMC* at p. 12. The *UPMC* consent decree was reasonable because: (a) UPMC’s remedial guarantee was “as effective as a finding of single employer status;” (b) the single employer allegations meant UPMC was not alleged to be a wrongdoer; (c) the order eliminated risk while providing an additional party to help guarantee a remedy; and (d) such an order “greatly expedites” the resolution of the proceedings because it eliminates a complex phase of the case. *Id.* at 8-9. The analysis is identical herein. In addition, changes in business and remedial circumstances bolster the consent order’s reasonableness. Respondent Affinity has gone out of business. The Corporate Respondents’ guarantee with respect to monetary remedies, providing a party who can pay, is significant in light of the closure. With respect to non-monetary remedies at Affinity, it would not further the purposes of the Act to continue litigating with the Corporate Respondents. Those remedies, if any, are no longer consequential (i.e. there are no employees affected by the remedy). Nor are non-monetary remedies with respect to Watsonville or Barstow significant with respect to the Corporate Respondents. Post-divestiture, the Corporate Respondents cannot effectuate those

remedies. The consent order is therefore reasonable, in part, because it resolves issues of vicarious responsibility on a *UPMC* guarantee basis. While most of these issues have become inconsequential, they remain expensive and time-consuming to litigate.

4. *Independent Stave Factors 3 and 4* - “[T]here are no allegations of fraud, coercion, or duress, and there is no evidence that UPMC has a history of violating the Act or has breached previous settlement agreements resolving unfair labor practice disputes.” *UPMC* at pp. 7-8. The analysis is identical herein.

### III. CONCLUSION

With *UPMC*, the Board delivered a case which applies directly to the Corporate Respondents’ efforts to resolve the single/joint allegations pled herein. The above modified consent order faithfully tracks language deemed acceptable by the Board in *UPMC*, which finds identical support in the instant case. The Affinity closure and other divestitures make the consent order even more reasonable than in *UPMC*. The Corporate Respondents respectfully request that the newly proffered consent order be accepted, resulting in the dismissal of the Corporate Respondents and the elimination of a single/joint hearing in this case.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned attorney, Robert D. Hudson, hereby certifies that on March 1, 2018, the foregoing was filed and served via e-mail upon:

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